FILED
JUN 29 1951
CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1951

No. 159

FLORIDA RAILROAD AND PUBLIC UTILITIES COMMISSION, ET AL.,

Appellants,

vs.

ATLANTIC COAST LINE RAILROAD COMPANY

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF FLORIDA

STATEMENT AS TO JURISDICTION

LEWIS W. PFEIFFER,
Counsel for Appellants.

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Jurisdictional Statement

In compliance with Rule 12 of the Rules of the Supreme Court of the United States, as amended, defendants submit herewith their statement particularly disclosing the basis upon which the Supreme Court has jurisdiction on appeal to review the judgment of the District Court entered in this cause.

Opinion Below

The opinion of the District Court for the Northern District of Florida, Tallahassee Division, is unreported. A copy of the opinion, findings of fact, conclusions of law and judgment is attached hereto as Appendix A.

Jurisdiction

The judgment of the District Court was entered on March 26, 1951. A petition for appeal is presented to the District Court herewith, to-wit: on May 25, 1951. The jurisdiction of the Supreme Court to review this decision by direct appeal is conferred by Title 28, United States Code, Sections 1253 and 2101(b). The following decisions sustain the jurisdiction of the Supreme Court to review the judgment on direct appeal in this case: Alabama Public Service Commission, et al. v. Southern Railway Company, unreported, the same being Case No. 395, October Term 1950, and decided May 21, 1951 by the Supreme Court; Alabama Public Service Commission, et al. v. Southern Railway Company, unreported, the same being Case No. 146, October Term 1950, and decided May 21, 1951 by the Supreme Court.

Question Presented

Where the state regulatory agency of the State of Florida, after hearing, enters an administrative order designed to assure adequate intrastate passenger service by a railroad operating within the State of Florida, may a three-judge district court exercise its equitable jurisdiction to vacate and permanently enjoin said order when the Florida procedure for the review of such orders is adequate in every way to preserve for ultimate review in the Supreme Court of the United States any federal questions arising out of such orders, or should such three-judge district court, in

the exercise of sound equitable discretion and in observance of the usual rule of comity, withhold its jurisdiction and require the complaining party to pursue its rights through the state courts.

Statute Involved

Section 350.16, Florida Statutes, 1949, which, in such part as is pertinent here, is as follows:

> ". . . Every railroad company shall operate over every part of its line not less than one passenger and one freight train each way daily except Sunday; provided if after hearing and investigation the railroad commission shall determine that the public need does not require such daily service they shall prescribe such service as in their opinion the public need does require and such service will be deemed sufficient until the commissioners shall otherwise order. However, nothing herein contained shall be held as limiting the right of the railroad commissioners to require of all railroads and common carriers such greater service as they shall deem to be to the best interest of the public."

Statement

The Atlantic Coast Line Railroad Company, hereinafter referred to as the Railroad, appellee herein, operates a railroad system throughout the South. This case, however, involves only that Florida intrastate passenger service furnished by trains Nos. 102-175 and 176-101 operated daily between Lakeland, Florida and Clewiston, Florida, wholly within the State of Florida. The Railroad applied to the Florida Railroad and Public Utilities Commission for permission to discontinue the daily operation of said trains and authority to operate in lieu of said daily service a tri-weekly service over said line. After a public hearing the Florida Commission entered an order October 19, 1950 denying the requested authority on the ground that the daily service is necessary to meet the public need.

Instead of pursuing its right to have said order reviewed by the Supreme Court of Florida, as provided by Florida procedure, the Railroad filed its complaint in the United States District Court alleging diversity of citizenship and that the required continued operation of said trains daily at an out-of-pocket loss amounted to confiscation of its property in violation of the Due Process Clause of the Fourteenth Amendment. Injunctive relief was prayed to protect the Railroad from irreparable loss. A three-judge court heard evidence from the Railroad, made its own findings of fact and entered judgment holding the Commission order void and permanently enjoining the enforcement of said order. The Florida Commission declined to offer any evidence but relied on its legal defenses to the complaint as set out in its motion to dismiss.

The Questions Are Substantial

The issues involved in this appeal are identical with those raised by Alabama Public Service Commission v. Southern Railway Company, decided by the Supreme Court on May 21, 1951, but presently unreported, and by a companion case, same style, decided the same day and also unreported. These issues are of importance to the State of Florida, and its regulatory agency which exercises jurisdiction over purely intrastate service of railroads operating within said state, in protecting the domestic policy of said state from needless obstruction and in preserving the rightful independence of state government in matters of a purely local and domestic nature.

It is submitted that the decision and judgment of the district court fails to observe the usual rule of comity which should govern the exercise of equitable jurisdiction by Federal District Courts in cases of this kind and is an

abuse of sound equitable discretion resulting in needless obstruction of the domestic policies of a sovereign state.

We believe that the questions presented by this appeal are substantial and that they are of public importance.

Respectfully submitted,

(S.) Lewis W. Petteway,
Counsel for Defendants-Appellants.

APPENDIX "A"

Before: Russell, Circuit Judge, Barker and DeVane, District Judges

BARKER, *District Judge:*

This is an action brought by the Atlantic Coast Line Railroad Company, a Virginia corporation, against the Florida Railroad & Public Utilities Commission, and the members thereof, to enjoin the enforcement of an order of the Commission entered October 19, 1950, requiring the continued operation of daily passenger train service between Lakeland and Clewiston, Florida. A Three-Judge Court was convened under authority of Title 28, USCA, Sec. 2281, and when the matter came on for hearing before the court on Plaintiff's application for an Interlocutory injunction, the matter, by stipulation of the parties, was submitted to the Court on final hearing for permanent injunction.

The purpose of the action is to overturn the order of the Florida Railroad & Public Utilities Commission, which denied Plaintiff's application for authority to reduce to tri-weekly the daily operation of two passenger trains between Lakeland and Clewiston, Florida. The basis of the action is that the Commission's order is so arbitrary and unreasonable and so completely unsupported by the evidence that: (1) the order results in the confiscation of Plaintiff's property and, therefore, is in violation of the due process clause of the Fourteenth Amendment to the Constitution of the United States; (2) that it places a burden on Interstate Commerce not permitted by the Commerce Clause of the Constitution (Art. 1, Sec. 8, Clause 3); and, (3) that it violates the National Transportation Policy prescribed by Congress, as set forth in Transportation Act of 1940 (54 Stat., 899).

Defendants filed an answer to the complaint and at the same time filed a motion to dismiss the complaint. The

Court will first consider and dispose of the motion to dismiss. The grounds for the motion are:

1. It affirmatively appears from the allegations of the complaint that this court is without jurisdiction to entertain this cause and grant relief sought by plaintiff.

2. It affirmatively appears from the allegations of the complaint that the administrative remedies and processes afforded by the laws of the State of Florida have not been exhausted and as a result thereof this Court has not and cannot acquire jurisdiction of the subject matter of this cause until said administrative remedies have been exhausted, and,

3. It affirmatively appears from the allegations of the complaint that adequate remedies at law are available to Plaintiff and that it is not entitled to injunctive relief until said remedies have been pursued and exhausted.

The gravamen of this motion is that Plaintiff should have defied the order and forced the Commission to proceed in some form against it, or, taken this case into the State Court, instead of the Federal Court, for relief." There is no doubt as to the complaint raising Federal questions, that the amount in controversy is in excess of $3,000.00 and that there is diversity of citizenship between the parties. There is also no question that the administrative remedies afforded plaintiff by Florida law have been exhausted and the case has reached the judicial stage.

Since the decision of the Supreme Court of the United States, in Smyth v. Ames, 169 U. S., 466, there has existed no doubt as to the right of an aggrieved party, entitled to sue, to invoke the jurisdiction and powers of a Federal Court, whenever the established principles and rules permit such a suit in that Court, and a party cannot be deprived of that right by reason of the existence of the right to sue, or be sued, in a State Court on the same cause of action. Bacon, et al. v. Rutland Railroad Co., 232 U. S., 134; Oklahoma Natural Gas Co. v. Russell, 261 U. S., 290; and, Pacific Telephone & Telegraph Co. v. Kykendall, et al., 265 U. S., 196.

The motion to dismiss will be denied.

The complaint alleges that on April 29, 1949, Plaintiff filed an application with the Florida Railroad & Public Utilities Commission requesting authority to discontinue daily operation of Plaintiff's passenger trains Nos. 102-175 and 176-101, between Lakeland and Clewiston, Florida, and the substitution, in lieu thereof, tri-weekly service in opposite directions on alternate dates with no service in either direction on Sunday.

Plaintiff alleges that the application was made and filed for the reason that such large losses were being continuously sustained in the daily operation of said trains, due to the lack of public patronage, that their continued daily operation was no longer reasonably necessary for the service to the public, and that the proposed tri-weekly service would then have met, and now would meet, any reasonable transportation needs of the public.

The complaint further alleges that the evidence before the Commission disclosed, for the twelve-n onths' period, from May 1, 1948 through April 30, 1949, Plaintiff sustained passenger service losses of $213,594.69 and that for the following fourteen-months' period, from May 1, 1949 through June 30, 1950, Plaintiff sustained further losses of $217,019.67.

In support of its allegation that the lack of public patronage made continued daily operation no longer reasonably necessary for the service of the public, Plaintiff set out in the complaint much of the evidence introduced before the Commission, bearing upon the extent of the use of its passenger trains by the general public, which shows that few persons used the service and that the revenue derived therefrom does not even compensate for the wages paid the crews operating the passenger trains.

The answer filed by Defendants, in general, admits the averments of the complaint as to the losses sustained by Plaintiff from the operation of the passenger train service in question, but denies there exists no public need for the service. In addition, the answer sets up certain legal defenses which, if valid defenses, will defeat Plaintiff's right to the relief prayed.

Plaintiff submitted evidence in support of each and

every allegation of the complaint, with reference to the monetary losses sustained and in support of its allegation that there was no public need for the service now rendered by it. The evidence submitted amply supports each allegation of the complaint as to the losses sustained and as to the existence of no urgent public need for the questioned service now being rendered by Plaintiff.

Defendants offered no testimony, but stood on their legal defenses to the complaint. Defendants rely first upon Florida Statutes, 1941, Sec. 350.16, which in such part as is pertinent here, is as follows:

> ". . . Every railroad company shall operate over every part of its line not less than one passenger and one freight train each way daily except Sunday; provided if after hearing and investigation the railroad commission shall determine that the public need does not require such daily service they shall prescribe such service as in their opinion the public need does require and such service will be deemed sufficient until the commissioners shall otherwise order. However, nothing herein contained shall be held as limiting the right of the railroad commissioners to require of all railroads and common carriers such greater service as they shall deem to be to the best interest of the public."

The contention is that this Statute places on Plaintiff the obligation to operate over every part of its line not less than one passenger train each way daily, except Sunday, unless the Commission, after a hearing and investigation, shall determine that the public need does not require such daily service, and that since this Statute was in effect when this branch line of railroad was put into operation, that Plaintiff cannot now complain that the order of the Commission is confiscatory of property or otherwise in violation of the Constitution of the United States or the Transpor-ation Act of 1940.

The second legal defense, which is, in fact, only complimentary to the first, is that the complaint, on its face, shows that Plaintiff operates its passenger service over its entire system at a heavy loss and that freight rates

have been increased by the Interstate Commerce Commission and many State Commissions, including the Florida Commission, to cover the deficit from system passenger operations. Defendants, therefore, contend it is incumbent on Plaintiff to prove that its entire operations, both passenger and freight, *on this branch* line, result in confiscation of the property of the branch line to entitle it to the relief sought in this Court.

The complaint alleges and the evidence introduced by Plaintiff shows that Plaintiff lost more than $921,000.00 on its system passenger business in 1946; more than $8,600,000.00 in 1947; more than $9,600,000.00 in 1948 and more than $8,700,000.00 in 1949. The evidence also shows that in 1949, after meeting the deficit of $8,700,000.00 in passenger system losses, Plaintiff had a net railway operating income of $6,753,898.91. All this shows the extent to which freight rates have been increased to take care of passenger operating losses.

Defendants rely upon State v. Georgia Southern and Florida Railway Company (190 So., 527) to sustain the validity of these defenses. That case was, in all respects, similar to this case, except as to the losses being sustained from the operation of the passenger service. In this case the losses are substantially greater than they were in that case.

The Supreme Court of Florida, in reviewing the validity of the order of the Florida Commission, refusing to grant the request of the Railroad Company to reduce the passenger service on one of its lines below the minimum service prescribed by the Statute, held:

> "The service of one mixed passenger and freight train each way every day, except Sundays, is a primary and imperative statutory duty which should be rendered in the interest of the public necessity for adequate local service, even though the particular service is rendered at a relatively small financial loss, when it appears that the company's entire system has substantial net earnings over all expenses and it is not clearly shown that the loss in rendering the particular

> local service is so out of proportion to the reasonable public necessity required to be met under the primary duties of the Railroad Company, as to operate as an unlawful deprivation of property rights of the appellee company."

The Court further held in that case that:

> "The asserted requirements for adequate train service are subject to judicial determination, and must be reasonable for public needs and not so unduly burdensome to the carrier, as to operate as an unlawful deprivation of property without due process of law or an unlawful taking of property for public purposes without just compensation. Each case should be determined by a fair consideration of all the pertinent facts affecting the rights of the public, the duty of the carrier with the burden to the carrier and the reasonable needs of the public. In particular cases the cost of the service may exceed the receipts therefrom, but this may not control if it does not unduly affect the receipts from the entire Railroad system of the company, or impair organic rights or directly and unreasonably burden or impede interstate or foreign commerce."

Plaintiff made no showing as to the gross and net revenue derived from its operation of the branch line involved in this suit, extending from Haines City to Clewiston, Florida, and offered testimony to the effect that under the system of accounts, prescribed by the Interstate Commerce Commission and maintained by Plaintiff, it was, as an accounting matter, impossible to furnish this information. Plaintiff did show, however, and it is not controverted on the record, the investment of Plaintiff, in Railroad property used in its transportation service, the net Railway operating income and the rate of return on property investment for the years 1946, 1947 and 1948. This evidence shows that the net Railway operating income produced a rate of return on the total investment in the property of less than 1% for the years of 1946 and 1947 and less than 2% for the year 1948. The evi-

dence also shows that the rate of return for 1949 was little, if any, better than for 1948.

The law is well settled that a common carrier is protected by the Constitution of the United States against confiscation and the police powers of the State are subject to the limitation that the property of a common carrier cannot be taken without just compensation or without due process of law.

Northern Pacific Railroad Co. v. North Dakota, 236 U. S., 585;
Mississippi Railroad Co., et al. v. Mobile & Ohio Railroad Co., 244 U. S., 388;
Atchison, Topeka & Santa Fe Railroad Co. v. Railroad Commission of California, 283 U. S., 380;
Lynchburg Traffic Bureau v. Commonwealth, 54 S. E. (2nd.), 66;
Delaware L. & W. R. Co. v. Van Santvoord, et al., 232 Fed., 978;
Atlantic Coast Line R. Co. v. Public Service Commission of South Carolina, et al., 77 Fed. Supp. 675;
Ann Arbor R. Co. v. Michigan Public Service Commission, et al., 91 Fed. Supp., 668;
Southern Railway Co. v. Alabama Public Service Commission, et al., 91 Fed. Supp., 980.

It is obvious to everyone that a rate of return of less than 2% is not a fair return on property devoted to public services. It is, therefore, clearly established in this case that Plaintiff is entitled to the relief sought, unless Defendants' contention that it is incumbent on Plaintiff to prove that its entire operations, both passenger and freight, on the *branch line* of Plaintiff here involved, results in the confiscation of the property of the branch line. The answer to this contention of Defendants is found in the decision of the Supreme Court of Florida in State v. Georgia Southern & Florida Railroad Co., supra., where the Court said the statutory requirements must be met by every Railroad Company "when it appears that the company's *entire system* has substantial net earnings over all operating expenses * * * ".

Moreover, to hold that Plaintiff is restricted by law to a

showing of net earnings on its branch line only would run counter to the Transpor-ation Act of 1940, to the policy adopted and followed by the Interstate Commerce Commission and by the Defendants in carrying out the provisions of said Act.

The evidence in this case clearly shows that if Plaintiff is to continue in the passenger business at all it must, of necessity, restrict passenger operations to those most essential in the public interest and limit its operations where no real public necessity exists for such daily operations as the Defendants' order requires in this case.

The Court finds and holds that Plaintiff sustains a substantial net loss in the operation of the daily passenger service over the branch line in question; that the continuation of the daily service prescribed by the order of the Florida Railroad & Public Utilities Commission, dated October 19, 1950, is not necessary to meet the public interests and is confiscatory of Plaintiff's property. The enforcement of said order and the imposition of penalties for its violation will be enjoined.

Dated at Tampa, Florida, this the 19th day of March 1951.

(S.) WILLIAM J. BARKER,

United States District Judge.

I concur:

(S.) DOZIER A. DEVANE,

United States District Judge.

RUSSELL, *Circuit Judge,* specially concurring:

I enter this special concurrence to make clear that in my view of the case there is no basis for any intimation or ruling at the present time other than that the plaintiff upon the showing made is entitled to an injunction prohibiting the Florida Railroad and Public Utilities Commission and its members from proceeding to enforce any penalties provided by Florida law because of any violation by the plaintiff *of an order of such Commission.*

The complaint originally named the Governor and the Attorney General of Florida as parties to the suit. How-

ever, upon the hearing the plaintiff moved the dismissal of these two officers. Thus the proceeding remained only as against the Railroad and Public Utilities Commission and the members thereof. There was no prayer for any declaratory adjudication. Injunction, temporary and permanent, only was sought, and this for the reason that the plaintiff could not disregard the order of the Commission without becoming subject to a possible penalty of $5,000.00 for each violation of the Commission's order as provided by Florida statutes of 1941, section 350.28 by proceedings instituted under Florida Statutes of 1941, section 350.36. In other words, the plaintiff submitted its case to the Court upon the showing that there was no public need for the passenger service, that the Commission should have permitted a reduction of such service, and that it was entitled upon the showing made to an injunction to restrain any attempt to enforce the penalties referred to. No other prospective or contingent liability was asserted or relied upon, and our opinion and any injunction issued should be clearly restricted to the precise question at issue. In view of the undisputed showing of no actual need for the passenger service provided by the trains in question, and the very substantial loss incurred in their operation, there is no doubt that upon applicable legal principles referred to by the majority, the *order of the Florida Railroad and Public Utilities Commission* denying the plaintiff's application and finding "that daily service is necessary to meet the public need," because of the opinion that the plaintiff "failed to sustain the burden of showing that daily service is not necessary along the route of its trains," is unreasonable and unsupported by any evidence before us. We must, therefore, hold the order ineffective, so that any proceeding to recover the penalties provided by the statute for violation of the order would result in subjecting the plaintiff unlawfully to such penalties because predicated upon a finding which in legal effect constitutes an unconstitutional requirement. Under the record here it is clear that as concerns the Commission's order requiring daily service the plaintiff should not be subjected to proceedings for its violation, and that any such proceeding should be enjoined.

On the other hand, other questions lurk in the proper construction and application of the statute of Florida referred to in the opinion requiring daily passenger service. This statute is referred to in the complaint and it is argued here that if it be applied so as to authorize the order complained of, it would be likewise unconstitutional. Since, as I view the matter, in the posture of the present litigation, we do not reach the question of the full effect of the statute, we have no occasion to consider its applicability other than as to the extent involved in the precise point of the present case, that it does not authorize the issuance of an order by the Commission which is unconstitutional in its requirements. It is not clear how the determination of the Commission affects the statute. Sufficient it is that the Commission did not rely upon the statute and placed its action squarely upon what it determined to be required by the public need along the branch line in question. It is not necessary to even attempt to consider the effect of the *statute* upon the plaintiff's proposed plan of reduced service, nor upon issues which might be hereafter presented to this or another Court based upon other and different proceedings and facts presented in support thereof. However, since I am in no doubt as to the invalidity of the order of the Commission here under attack, I join in that portion of the opinion and in the injunction directed to issue restraining the enforcement of the order and any imposition of penalties for its violation.

This March 19, 1951.

(S.) Robert L. Russell,
U. S. Circuit Judge.

Office-Supreme Court, U. S.
FILED
JUN 29 1951
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STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM

CHARLES COOK HOWELL,
G. L. REEVES,
FRANK G. KURKA,
Counsel for Appellee.

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APPELLEE'S MOTION TO DISMISS OR AFFIRM, AND STATEMENT IN OPPOSITION TO APPELLANTS' JURISDICTIONAL STATEMENT.

The Appellee Railroad Company files this statement in opposition to Appellants' jurisdictional statement, and includes a motion to dismiss the appeal or to affirm the judgment.

The motion to dismiss is based on the fact that Appellee never had an adequate remedy in the courts of Florida, and

that if it once had such a remedy it has been lost through no fault of the Appellee's.[1]

The order allowing the appeal, rendered May 25, 1951, was signed by the three judges who signed the judgment. It bears on its face the unique notation "filed before me this 25th day of May, 1951, Dozier A. DeVane, District Judge". However, it was not filed in the Clerk's office until May 28, 1951. If the judgment did not become effective until filing, what shall be said about this order allowing the appeal?

Two citations were issued: One signed by the Clerk and the other by District Judge DeVane. Both are dated May 25, 1951. The first citation was served May 28, 1951; later the citation signed by the Judge was served June 4, 1951.

If the appeal is not dismissed the case should be affirmed because the appeal presents no substantial question.

In any event, and if the worst hoped by the Appellants should befall the Appellee here, the District Court should retain jurisdiction for a reasonable time to permit the Ap-

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[1] While our motion to dismiss is not based at all on technical grounds, there is an untimeliness in the appeal and some peculiarities, not to say irregularities, about it that well might justify the dismissal of the appeal. Unlike other appeal statutes (28 U. S. Code 2101(a), (c)), which authorize the taking of other appeals to this Court within thirty, and ninety days, respectively, after the "entry" of the judgment or decree, the statute regulating this appeal (28 U. S. Code 2101 (b)) requires it to be taken within sixty days "from the judgment", nothing being said about either "entry" or "rendition". The judgment appealed from was rendered and dated March 20, 1951. It was filed in the Clerk's office March 26, 1951 and the appeal was not taken until May 25, 1951, more than sixty days "from the judgment" and exactly sixty days from the "entry" of the judgment. There is no indication in the legislative history that these statutory differences were due to an oversight. Circuit Judge Maris, testifying before the House Sub-Committee No. 1, March 7, 1947, said that the successive drafts of Title 28 of the Code "were considered section by section". (U. S. Code Congressional Service, 1948, p. 1958). When the bill to adopt the Code was debated in the House July 7, 1947, Mr. Robsion said (93 Congressional Record, 8550; U. S. Code Congressional Service, 1948, p. 1993) that the drafts were reviewed by the Committee on Revision of the Laws, in conjunction with the Judicial Conference Committee, "section by section".

pellee to seek review in the State courts of Florida of the order appealed from.

I

Statement of Issues on Appeal

The Appellants plant the appeal solely upon the holding of this Court in *Alabama Public Service Commission* v. *Southern Railway Company*, No. 395, October Term 1950, decided May 21, 1951 (19 U.S.L. Week 4314); and the only question presented therefore is whether the 3-Judge Federal Court sitting in Florida which decided this case in the exercise of jurisdiction which undoubtedly it had, should have abstained from exercising that jurisdiction so that the litigation might have been had in the Florida State courts.

The opinion of the District Court in this case is reported in 96 F. Supp. 583.

II

The Facts

The Railroad Company during a period beginning May 1948 and ending with June 1950 had been operating at a heavy loss two of its trains which ran daily between Clewiston, Florida and Lakeland, Florida. The Company made appropriate application to the Florida Railroad and Public Utilities Commission for authority to curtail such operations so that the trains would run in opposite directions on alternate days of the week but with no service in either direction on Sunday. Such desired curtailed operations were designated by the District Court as comprising "triweekly service".

The Florida Commission denied the application. The Railroad Company instituted this suit in the District Court. There it was tried *de novo*, the Florida Commission offering no evidence but announcing that it stood on a motion to dismiss which it had filed, which motion was based solely on

grounds, to quote the opinion of the 3-Judge Court (96 F. Supp. 584), that Coast Line "should have defied the order and forced the Commission to proceed in some form against it, or taken this case into the State court, instead of the Federal court, for relief". No ground of the motion went to the point upon which the Commission seeks here to reverse the judgment.

At the trial before the District Court the Railroad Company proved, according to the findings of the Court (96 F. Supp. 585, 586, 587):

1. That "for the twelve-months' period from May 1, 1948 through April 30, 1949, Plaintiff sustained passenger service losses of $213,594.69 and that for the following fourteen-months' period from May 1, 1949 through June 30, 1950, Plaintiff sustained further losses of $217,019.67". (Those losses ran at the rate of approximately $16,562.09 each month, $544.00 every day. If the maximum revenues had been lost by the curtailment of the operations, there would have resulted nevertheless annual savings in direct expenses of $3,800.00 per month (par. VII, Sworn Bill of Complaint).)

2. That "Plaintiff lost more than $921,000.00 on its system passenger business in 1946; more than $8,600,000.00 in 1947; more than $9,600,000.00 in 1948 and more than $8,700,000.00 in 1949. The evidence also shows that in 1949, after meeting the deficit of $8,700,000.00 in passenger system losses, Plaintiff had a net railway operating income of $6,753,898.91. All this shows the extent to which freight rates have been increased to take care of passenger operating losses".

3. That "the net Railway operating income produced a rate of return on the total investment in the property of less than 1% for the years of 1946 and 1947 and less than 2%

for the year 1948. The evidence also shows that the rate of return for 1949 was little, if any, better than for 1948".

And the District Court concluded that, "it is obvious to everyone that a rate of return less than 2% is not a fair return on property devoted to public services"; and found as a concluding fact that the continuation of the daily service "is not necessary to meet the public interests and is confiscatory of Plaintiff's property". 96 F. Supp. 587.

The evidence also showed, though not so found by the District Court, that Coast Line's return on its investment in 1949 after deduction for fixed charges, was only .76 of 1%.

III

Appellee Had No Adequate Remedy in the Florida State Courts

Florida has afforded in a case like this, no "right of appeal to the State courts" (*Alabama Public Service Commission* v. *Southern Railway Co.*, No. 395, October Term 1950, decided May 21, 1951) as the State of Alabama had in that case.

No remedy by appeal from an order of the Florida Railroad and Public Utilities Commission is afforded by the laws of Florida. The method of review prescribed is by certiorari, and recent attempts by the Appellee here to take advantage of the right of appeal have met with disaster. *Atlantic C.L.R. Co.* v. *King*, — Fla. —, 47 So. 2d 514 (1950); *Atlantic C.L.R. Co.* v. *U. S. Sugar Corp.*, — Fla. —, 47 So. 2d 513 (1950). In their jurisdictional statement Appellants criticize Appellee for not "pursuing its right to have said order [of the Commission's] reviewed by the Supreme Court of Florida, as provided by Florida procedure". There is no such right. Certiorari, under the law of Florida, is not of right but a matter of grace.

> "The exercise of jurisdiction under writ of certiorari is quite different from the exercise on appeal or writ

> of error. The former is a discretionary writ used to determine whether the essential requirements of the law have not been complied with to the material injury of petitioner. An appeal or writ of error is taken as matter of right to have determined whether harmful error has been committed. See Jacksonville T. & K.W. Ry. Co. v. Boy, 34 Fla. 389, 16 So. 290; Harrison v. Frink, 75 Fla. 22, 77 So. 663; Brinson v. Tharin, 99 Fla. 696, 127 So. 313".

South Atlantic S.S. Co. of Delaware v. *Tutson, et al.*, 139 Fla. 405, 190 So. 675, 683 (1939).

The scope of certiorari in Florida is thus stated in *Farnham* v. *Caldwell,* 141 Fla. 416, 193 So. 286 (1940), citing numerous prior Florida cases:

> "Certiorari is a common-law writ which issues in the sound judicial discretion of the court to an inferior court, not to take the place of a writ of error or an appeal, but to cause the entire record of the inferior court to be brought up by certified copy for inspection, in order that the superior court may determine from the face of the record whether the inferior court has exceeded its jurisdiction, or has not proceeded according to the essential requirements of the law, in cases where no direct appellate proceedings are provided by law."

The writ is used in Florida only "to quash illegal judgments, not to assume and complete the adjudication of a cause". *First Nat. Bank* v. *Gibbs,* 78 Fla. 118, 82 So. 618, 620 (1919).

Even when the writ runs from the Florida Supreme Court to a Circuit court of that state (the Circuit court being the highest court of original jurisdiction), "the Supreme Court will not question the correctness of the judgment of the Circuit court upon its merits." *Farnham* v. *Caldwell,* 141 Fla. 416, 193 So. 286, 287 (1940), citing prior cases.

Late words to the same effect were spoken by the Florida court in 1943. In *Wolkowsky* v. *Goodkind,* 153 Fla. 267, 14 So. 2d 398, 402, the Court said:

> "The review in this Court on certiorari addressed to a judgment of the Circuit Court rendered in the exercise of its powers as an appellate court is limited by the scope of the common law writ. The scope of review is much narrower than on appeals. We have held that on review by certiorari, the general rule is that the sufficiency of the evidence or the weight and probative force of conflicting testimony will not be considered."

And in *Stansell* v. *Marlin,* 153 Fla. 421, 14 So. 2d 892 (1943), the Court reaffirmed what it had said in prior cases:

> "The exercise of jurisdiction under writ of certiorari is quite different from the exercise on appeal or writ of error. The former is a discretionary writ used to determine whether the essential requirements of the law have not been complied with to the material injury of petitioner. An appeal or writ of error is taken as matter of right to have determined whether harmful error has been committed."

Those statements by the Florida Supreme Court are reminiscent of the views expressed by this Court in *Wade* v. *Mayo,* 334 U.S. 672, 680, (1947):

> "Writs of certiorari are matters of grace. Matters relevant to the exercise of our certiorari discretion frequently result in denials of the writ without any consideration of the merits. The constitutional issue may thus have no bearing upon the denial of the writ. Where it is apparent or even possible that such would be the disposition of a petition for certiorari from the state court's judgment, failure to file a petition should not prejudice the right to file a habeas corpus application in a district court. Good judicial administration is not furthered by insistence on futile procedure."

There are three other indications, virtually demonstrative, that this Court's holding in *Alabama Public Service Commission* v. *Southern Ry. Co.*, No. 395, October Term 1950, decided May 21, 1951, that Southern Railway had an adequate remedy in the Alabama State courts is no holding that in this case the Atlantic Coast Line has such a remedy in the State courts of Florida. (1) The Alabama Court "is empowered to set aside a Commission's order found to be contrary to the substantial weight of the evidence" (Alabama Code 1941, Title 48, Sec. 82); but in Florida the Supreme Court of the State itself says that it has no such power. *Wolkowsky* v. *Goodkind*, 153 Fla. 267, 14 So. 2d 398, 402 (1943). (2) The appeals provided by the Alabama law "are 'supervisory in character' ". Not so in Florida; its Supreme Court eschews such supervision. (3) The Supreme Court of Alabama has held that judicial review in that State of Commission orders "calls for an independent judgment as to both law and facts when a denial of due process is asserted". The Florida Supreme Court has made no such allowance. On the contrary it has said explicitly that on certiorari the record will not be examined "for the purpose of determining whether the evidence was of sufficient probative force to sustain the verdict, nor to reconcile conflicting testimony". (*Brinson* v. *Tharin*, 99 Fla. 696, 127 So. 313, 316 (1930)); and that when certiorari is granted, "the subject matter of the suit is not here re-investigated, tried and determined upon the merits generally as upon appeal or writ of error". (*Jacksonville American Pub. Co.* v. *Jacksonville P. Co.*, 143 Fla. 835, 197 So. 672, 674 (1940)).

Supersedeas Not Available in Florida

Certiorari in Florida is not only a matter of grace as opposed to a matter of right, and one wholly within the dis-

cretion of the Florida Supreme Court, but, more importantly, there is no method in Florida in cases of certiorari, as in Alabama upon appeal there is, by which a negative order of the Florida Commission may be superseded.

The Alabama statutes specially contemplate that supersedeas may be awarded in connection with an appeal from an order of the Alabama Commission which declines or refuses to take action applied for by a carrier as well as in cases in which an order of that Commission's is affirmative in its operation (Alabama Code 1940, Title 48, Sec's 81, 84, 88).

Supersedeas in connection with certiorari is unavailing in Florida on two scores. The Florida statutes and rules of court provide for supersedeas only where the application is made to the Supreme Court to review an order of a *court* (Fla. Stat. 1941, Sec. 59.13(7); Rule 35(f) Supreme Court Rules of Practice). Further, the provisions in Florida read only that if the proper machinery is set in motion the "court may [not that it must] grant a supersedeas or stay . . .". And where the order involved is a negative one merely denying an application to curtail train service, a supersedeas would be as ineffective to permit curtailed operation as would a supersedeas upon an appeal taken from an order of a court refusing to grant a conventional injunction. In each case, there would be nothing to supersede.

The case here therefore is of the same sort as specified in *Pacific Tel. & Tel. Co.* v. *Kuykendall,* 265 U.S. 196 (1924) "where supersedeas was not available to adequately protect federal rights" (*Alabama Public Service Commission* v. *Southern Railway Co.,* No. 395, October Term 1950, decided May 21, 1951, n. 10), and the propriety of the exercise of Federal jurisdiction was upheld.

As if that were not enough, there are specific holdings in some earlier Florida cases that in a case like that before us now a railroad company has no affirmative remedy at all, but can only disobey an adverse order of the Florida Commission's and then sit and wait to see what action if any the Commission itself will institute.

In *Florida East Coast Ry. Co.* v. *State*, 79 Fla. 66, 83 So. 708, 715, 716 (1920) the Court said:

> "It has been held by this court that where the Railroad Commissioners exceed or abuse the authority and discretion conferred upon them, by making an order that illegally invades the property rights of a railroad company, the illegality of the order is available as a defense in proceedings at law to compel the company to obey the invalid order, or in an action for a statutory penalty for a violation of the order; therefore the remedy at law is adequate, and an injunction will not be granted in the absence of some ground for equitable relief. Louisville & N. R. Co. *v.* Railroad Com'rs., 63 Fla. 491, 58 South. 543, 44 L.R.A. (N.S.) 189.
>
> "In view of the statutes and of the decisions of this court, it must be assumed that the statutes contemplate that if those who are to observe the administrative rates, rules, and orders of the Railroad Commissioners, duly and reasonably assert the invalidity of the rates, etc., as they affect private property rights, and decline to observe the rates, etc., the Railroad Commissioners shall, in due course and without needless delay, test the validity of their action by invoking appropriate judicial proceedings to enforce the questioned rate, etc. When this is done, those who assert a violation of their organic property rights may contest the enforcement of the challenged rates, rules or regulations".

At the trial in the District Court the Florida Commission in support of its motion to dismiss took this

very view, viz., that the Coast Line should have curtailed the service anyway and then awaited such action, if any, as the Commission might bring. It is to this that Circuit Court Judge Russell specially concurring (96 F. Supp. 588) alluded when he wrote:

> ". . . that the plaintiff could not disregard the order of the Commission without becoming subject to a possible penalty of $5,000.00 for each violation of the Commission's order as provided by Florida statutes of 1941, section 350.28, F.S.A., by proceedings instituted under Florida statutes of 1941, section 350.36 F.S.A."

No remedy at all is afforded by such a compelled quiescense. No legal remedy is adequate or complete "where the adequacy and completeness of the remedy depend on the will of the opposing party". (*Baker* v. *Farish*, 244 Ala. 178, 12 So. 2d 547 (1943); *Harrell* v. *Vieg*, 246 Ala. 669, 22 So. 2d 94 (1945)). For a remedy to be adequate it must be one "vested in the complainant to which he may at all times resort at his own option, fully and freely, without let or hindrance". (*Columbian Cat Fanciers, Inc.* v. *Koehue*, 96 F. 2d 529 (C.A.D.C. 1938)).

All those considerations indicate that this case is squarely covered by *Spector Motor Service* v. *O'Connor* (decided March 26, 1951), —— U. S. ——, 95 L. Ed., Adv. Sh. p. 435. When Spector came to this Court in 1944 it was remanded to the District Court "with directions to retain the bill pending the determination of proceedings to be brought in the State Court in conformity with the opinion rendered". That having been done, this Court said, March 26, 1951 (95 L. Ed., Adv. Sh. p. 437, 438):

> "The United States District Court had jurisdiction over this case in the first instance because of the uncertainty of the adequacy of a remedy in the state

courts, and it did not lose that jurisdiction by virtue of the later clarification of the procedure in the courts of Connecticut. American Life Ins. Co. *v.* Stewart, 300 US 203, 81 L. ed. 605, 57 S. Ct. 377, 111 ALR 1268; Dawson *v.* Kentucky Distilleries & Warehouse Co., 255 US 288, 65 L. ed. 638, 41 S. Ct. 272".

And so we submit, in any view of the matter, that it is apparent that the Florida procedure for a review of the Commission's orders is inadequate "to preserve for ultimate review in this Court federal questions arising out of such orders" (*Alabama Public Service Commission* v. *Southern Ry. Co.*, No. 395, October Term 1950, decided May 21, 1951).

IV

If There Once Were a Remedy in the Florida Courts It Has Been Lost by No Fault of the Appellee's

It is quite unrealistic to say that Coast Line now has available to it any remedy at all under the Florida procedure—for the time within which certiorari might have been applied for expired 60 days after the rendition of the Commission's order on October 19, 1950. Fla. Stat. 1941, Sec. 350.641 requires that all petitions to the Florida Supreme Court for certiorari to review orders of the Florida Railroad and Public Utilities Commission "shall be filed in the Supreme Court within sixty days after the entry or rendition of the order sought to be reviewed".

When the railroad company was confronted with the Commission's order it had two courses left open to it: To proceed as it did in the courts of the United States which for 75 years had exercised their jurisdiction to review such orders and in proper cases had enjoined their enforcement; or to apply to the Supreme Court of Florida for certiorari. When it chose the path marked out by the National courts, Coast Line was following the rulings an-

nounced in the following nine cases by six Circuit Judges and fourteen District Judges during a period which began in 1916:

Delaware L. & W. Ry Co. v. *Van Santvoord et al.*, 216 F. 252 (D. C. N.Y. 1914); 232 F. 978 (D.C. N.Y. 1916);

Great Northern Ry. Co. v. *Nagle*, 16 F. Supp. 532 (D.C. Mont. 1936);

Northern Pacific Ry. Co. v. *Board of Railroad Commissioners of Montana*, 46 F. Supp. 340 (D.C. Mont. 1942);

Chicago, B. & Q. R. Co. v. *Board of Railroad Commissioners*, 78 F. Supp. 1010 (D.C. Mont. 1947);

Atlantic Coast Line R. Co. v. *Public Service Commission of South Carolina*, 77 F. Supp. 675 (D.C. S.C. 1948);

C. B. & Q. R. Co. v. *Illinois Commerce Commission*, 82 F. Supp. 368 (D.C. Ill. 1949);

Southern Railway Co. v. *Alabama Public Service Commission*, 91 F. Supp. 980 (D.C. Ala. 1950);

Ann Arbor R. Co. v. *Michigan Public Service Commission*, 91 F. Supp. 668 (D.C. Mich. 1950);

Atlantic Coast Line R. Co. v. *Alabama Public Service Commission*, 92 F. Supp. 579 (D.C. Ala. 1950).

The Florida statute limiting certiorari to 60 days, there is now no method for the review of the order if this Court enters in this case the same sort of judgment it did in the Southern Railway case from Alabama. (*Alabama Public Service Commission* v. *Southern Railway Company*, No. 395, October Term 1950, decided May 21, 1951). Thereupon the Coast Line will be without any remedy at all simply because it did not anticipate that this Court would find it appropriate to reverse the long prevailing practice in cases of this sort. It is not true here as in Southern Rail-

way's case this Court found it was, that the enforcement of the rule announced in that case was "but a recognition . . . that a federal court of equity . . . should stay its hand in the public interest when it reasonably appeared that the private interests will not suffer . . .". Private interests—but private interests much affected with a public interest—will suffer here, and that right grievously at the rate of $3800.00 a month while the slow procedural process, begun all over again, is being unwound before the Florida Commission.

For these reasons we urge that in any event if a reversal must result here, its declaration be so modified so as to allow the Atlantic Coast Line to apply to the District Court for a temporary restraining order against the enforcement of the Florida Commission's order until such reasonable time as the Railroad Company might require to proceed in the Florida State courts. Such a direction to the District Court would be in consonance with the following holdings of this Court:

Railroad Commission v. *Pullman Co.*, 312 U.S. 496 (1941) in which the Court, at page 501, said:

> "We therefore remand the cause to the district court, with directions to retain the bill pending a determination of proceedings, to be brought with reasonable promptness, in the state court in conformity with this opinion".

Spector Motor Co. v. *McLaughlin*, 323 U.S. 101 (1944) in which the Court, at page 106, gave direction:

> "We therefore vacate the judgment of the Circuit Court of Appeals and remand the cause to the District Court with directions to retain the bill pending the determination of proceedings to be brought with reasonable promptitude in the State court in conformity with this opinion".

Equally apropos we think is *St. Louis, etc. R. Co.* v. *Public Commission,* 279 U.S. 560 (1929) where a final decree of a 3-Judge Court in a somewhat comparable case was vacated, but the restraining order rendered by that court was continued, to the end that the subject matter of the controversy should be determined on its merits "without subjecting the railway to any prejudice because of its failure to ask leave before discontinuing the service" of certain passenger trains.

It is respectfully submitted therefore in conclusion that the appeal should be dismissed; that if it is not the decree should be affirmed, and that in any event the Appellee should not be remitted to the Florida State courts without a temporary restraining order from the District Court which will protect the Railroad Company from continued losses while this litigation continues in the Florida courts.

Respectfully submitted,

CHARLES COOK HOWELL,
P. O. Box 461,
Wilmington, North Carolina;
G. L. REEVES,
Stovall Professional Building,
Tampa, Florida;
FRANK G. KURKA,
P. O. Box 461,
Wilmington, North Carolina;
Attorneys for Appellee.

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Supreme Court of the United States

October Term, 1951

No. 159

THE FLORIDA RAILROAD AND PUBLIC UTILITIES COMMISSION, et al . . . . Appellants,

vs—

ATLANTIC COAST LINE RAILROAD COMPANY . . . . . Appellee.

APPELLANTS' BRIEF IN OPPOSITION TO APPELLEE'S MOTION TO DISMISS OR AFFIRM

LEWIS W. PETTEWAY,
Counsel for Appellants.

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ATLANTIC COAST LINE RAILROAD COMPANY . . . . . Appellee.

APPELLANTS' BRIEF IN OPPOSITION TO APPELLEE'S MOTION TO DISMISS OR AFFIRM

OPINION OF THE COURT BELOW

The judgment of the District Court for the Northern District of Florida, Tallahassee Division, which is the subject matter of this appeal, was unreported at the time appellants' jurisdictional statement was filed. A copy of the opinion, findings of fact, conclusions of law, and judgment was attached to said jurisdictional statement as Appendix A. The opinion has now been reported and will be found in *96 F. Supp. 583, Advance Sheet No. 4,* dated May 21, 1951.

JURISDICTION

The judgment of the District Court was filed with the Clerk of said Court and entered on March 26, 1951. The petition for appeal herein was presented to the members of said District Court while they were in New Orleans, Louisiana on May 25, 1951, and the order allowing the appeal was signed by the members of said Court on the same day and marked "filed before me this 25th day of May, 1951. Dozier DeVane, District Judge." All members of the Three-Judge District Court, aforesaid, as well as all Federal Judges from the State of Florida were, on May 25, 1951, attending a conference of Federal Judges in New Orleans, Louisiana, which explains the reason why the order allowing the appeal was filed with the Court itself on May 25, 1951, rather than with the Clerk. Only in this way could the appeal be perfected within the statutory period since it was humanly impossible to return the order allowing the appeal to the Clerk's Office in Tallahassee, Florida and file the same there on May 25, 1951, the last day on which the appeal could be taken. The order allowing the appeal was brought to Tallahassee by District Judge DeVane and delivered to the Clerk on Monday, May 28, 1951. This appeal was perfected within the statutory period.

APPELLEE'S MOTION TO DISMISS OR AFFIRM

The appellee herein has filed a rather comprehensive reply to appellants' jurisdictional statement and has incorporated therein its motion to dismiss this appeal or affirm the judgment of the lower court. The motion to dismiss is based on appellee's contention that it never had an adequate remedy in the State Courts of Florida and that if it did at

one time have such a remedy, it has since been lost through no fault of the appellee. Such a contention is neither sound in law nor accurate from a factual standpoint.

The order of the Florida Railroad and Public Utilities Commission which was under attack before the lower court was entered by said State Commission on October 19, 1950. The injunction proceedings whereby appellee sought to have said order vacated was instituted in the lower court on December 27, 1950, the *sixty-first* day after the entry of the Commission's order. Orders of the Florida Commission may be reviewed by the Supreme Court of Florida if such proceedings for review are commenced within *sixty* days from the entry of the order in question. In this case, the appellee waited until the time for seeking a review in the State Court had transpired before asking injunctive relief in the Federal Court. This was of appellee's own choosing and it cannot now complain if it has lost its rights to have the Commission's order reviewed in the State Court.

Appellee has set out in its reply to appellants' jurisdictional statement, and as a basis for its motion to dismiss this appeal, that no remedy by appeal from an order of the Florida Commission is afforded by the Laws of Florida, and that recent attempts by the appellee to take advantage of the right of appeal to the Supreme Court of Florida from similar orders have met with disaster. Appellee cited the following cases in support of said statement: *Atlantic Coast Line Railroad Co. vs. King, 47 So.2d, 514,* and *Atlantic Coast Line Railroad Co. vs. U. S. Sugar Corporation, et al., 47 So.2d, 513.* Reference to these two cases will disclose that the appellee herein did attempt to take an appeal to the Supreme Court of Florida from two separate orders entered

by the Florida Railroad and Public Utilities Commission. These cases do not disclose, however, that the appellee met with disaster. As a matter of fact, while the Supreme Court of Florida in each case held that *certiorari* and not *appeal* was the proper method of review, the Court treated each such appeal as a certiorari and required that each cause should proceed in accordance with rules governing certiorari proceedings. The Sugar Corporation case has not yet reached final decision, however, the other case has been finally decided by the Supreme Court of Florida and is reported in *49 So.2d, 89.* A study of the Court's opinion in this case, which was handed down on November 28, 1950, just prior to the time injunction proceedings herein were instituted in the lower court, will disclose that it was decided by the Supreme Court of Florida strictly on the *facts* as disclosed by the evidence presented to the Florida Commission. This case involved questions somewhat similar to those involved in the present case and amply demonstrates that the Florida Supreme Court *will* set aside an order of the Florida Commission which is found to be contrary to the substantial weight of the evidence, or erroneous as a matter of law, which clearly meets the requirements of this Court's recent decision in the case of *Alabama Public Service Commission vs. Southern Railway Co.*, decided May 21, 1951, *(19 U.S.L. Week 4314).*

It has long been recognized that judicial review of orders of the Florida Railroad and Public Utilities Commission is an integral part of the regulatory process under the laws of Florida. The Supreme Court of Florida time and time again has held that it *will review* orders of the Commission and that such orders *will be set aside* where materially injurious to legal rights or privileges and which do not give

an appropriate consideration to relevant facts — *Florida Motor Lines vs. Railroad Commissioners, 129 So., 876.*

In a very recent case the Atlantic Coast Line Railroad Company, the appellee herein, applied to the Florida Commission for an order allowing it to close its station agency at Longwood, Florida for a short period during the Summer months of each year. After a public hearing the Florida Commission denied the application and the Atlantic Coast Line brought certiorari proceedings in the Supreme Court of Florida to have the Commission's order reviewed. In its decision in that case, *Atlantic Coast Line R.R. Co., v. King, et al. 51 So.2d, 723,* dated April 6, 1951, the Supreme Court of Florida said:

> "It is established law that this Court will not interfere with conclusions reached by the Railroad Commission as to factual matters, but in instances where the Railroad Commission fails or omits to correctly construe or interpret the legal effect of the testimony, when considered in its entirety, then this Court, on petition for certiorari, will give to such testimony the interpretation that should have been given by the Railroad Commission."

It seems abundantly clear to us that the laws of Florida adequately provide for judicial review of orders entered by the Florida Railroad and Public Utilities Commission.

In addition to the review of such regulatory orders through certiorari proceedings there is another method whereby one aggrieved by an order of the Florida Commission can protect his rights through judicial proceedings in the State Courts of Florida. We refer to the proceedings which were followed in the case of *State vs. Georgia So. and*

F. Railway Co., 190 So., 527. In this case the Georgia-Southern and Florida Railroad Co. applied to the Florida Commission for authority to substitute twi-weekly passenger train service over the Company's line from Valdosta, Georgia to Palatka, Florida, in lieu of the daily service then being furnished over said road. The Florida Commission denied the application and was immediately notified by the Railroad Company that the service would on a stated day be reduced to tri-weekly service notwithstanding the order of the Commission. The Commission then brought suit to enjoin the company from discontinuing the daily service over said line. This illustrates another method under Florida procedure whereby one may force a judicial determination of his rights which may have been adversely affected by a regulatory order of the Florida Commission.

Under Florida law adequate State Court review of the administrative order in question here, based upon predominately local factors, was available to appellee had it taken advantage of its opportunities within the time allowed by law so that intervention of the Federal Court was not necessary for the protection of appellee's Federal rights.

APPELLEE'S REQUEST FOR RETENTION OF JURISDICTION BY LOWER COURT PENDING REVIEW OF COMMISSION'S ORDER BY STATE COURT

The appellee has requested that if a reversal must result herein, as we submit it must under recent decisions of this Court, then such reversal should accord to the appellee the right to apply to the District Court for a temporary restraining order against the enforcement of the Florida Commission's order until such reasonable time as the appellee

might require to proceed in the State Courts. We submit that such a request should not be granted in view of the decision handed down by this Court on June 4, 1951 on the motion of Southern Railway in Case No. 395, *Alabama Public Service Commission vs. Southern Railway Company*, supra, for an order by this Court to require the District Court for the Middle Alabama District to retain jurisdiction pending resort by the Southern Railway to the State Courts for appropriate relief. In making said motion Southern Railway took the position that by resorting to the U. S. District Court instead of taking its appeal under the State Statute during the thirty-day period allowed for that purpose, it probably had lost its right to such appeal and might now find it too late for consideration to be given its case in the State Courts and that it ought not to be prejudiced by reason of the fact that it elected to resort to the Federal Court rather than the State Court. This argument which was advanced by Southern Railway in the Alabama Case is the same as that advanced by Atlantic Coast Line in the present case. However, this Court found no merit in the argument, the motion was denied and no provision was made in the Court's mandate for retention of jurisdiction by the District Court pending proceedings in the State Court.

On the basis of the Court's decision in the case of Southern Railway Company, supra, we submit that appellee's request herein for retention of jurisdiction by the District Court should be denied.

CONCLUSION

On June 4, 1951 this Court reversed the decisions of two other Three-Judge District Courts from Alabama on the basis of the decision in *Alabama Public Service Commission vs. Southern Railway Company,* supra. We refer to Case No. 483, *Alabama Public Service Commission vs. Atlantic Coast Line Railroad Co.,* and Case No. 660, *Alabama Public Service Commission vs. Louisville and Nashville Railroad Company.* These cases are as yet unreported.

On the basis of the recent decisions of this Court handed down on May 21, 1951 and on June 4, 1951, and which we have cited herein, we respectfully submit that appellee's motion to dismiss this appeal or affirm the judgment of the lower court ought to be denied and appellee should be left to pursue through the State Courts whatever rights it may have.

Respectfully submitted,

LEWIS W. PETTEWAY,

Counsel for Appellants.

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing brief upon all parties of record in this proceeding, by mailing a copy thereof properly addressed to each such party as required by the Rules of Practice.

Dated at Tallahassee, Florida, this....28th.....day of June, 1951.

LEWIS W. PETTEWAY, of Counsel.

No. 159. FLORIDA RAILROAD & PUBLIC UTILITIES COMMISSION ET AL. *v.* ATLANTIC COAST LINE RAILROAD CO. Appeal from the United States District Court for the Northern District of Florida. *Per Curiam:* The judgment is vacated and the case is remanded to the District Court for further consideration in the light of *Alabama Public Service Comm'n* v. *Southern R. Co.*, 341 U. S. 341. *Lewis W. Petteway* for appellants. *Charles Cook Howell* and *G. L. Reeves* for appellee. Reported below: 96 F. Supp. 583.